IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-119

JAMES DAY HODGSON, Secretary of Labor,

Plaintiff-Respondent,

—and—

MIKE TRBOVICH (Proposed Intervenor),

Petitioner,

—v.—

UNITED MINE WORKERS OF AMERICA,

Defendant-Respondent.

MOTION FOR LEAVE TO FILE A BRIEF AND BRIEF OF AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*

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MOTION FOR LEAVE TO FILE BRIEF OF AMERICAN CIVIL LIBERTIES UNION AS *AMICUS CURIAE*

It is hereby respectfully moved pursuant to Rule 42 of the Rules of this Court that the American Civil Liberties Union be granted leave to file the accompanying brief *amicus curiae* in support of the petitioner.

The *amicus curiae* filed a brief in support of the Petition for Writ of Certiorari. Letters of consent were filed with that brief from the petitioner and the respondent-plaintiff, the Secretary of Labor. By an oversight, consent was not requested from the respondent-defendant, United Mine Workers of America, and service was not made on counsel for the respondent-defendant. As soon as this oversight was noticed, counsel for the respondent-defendant was

served three copies of the *Brief in Support of the Petition for Writ of Certiorari* by first class airmail on October 27, 1971. On the same day counsel for the *amicus curiae* contacted counsel for respondent-defendant, apprised him of the oversight, and requested leave to file the attached brief in support of the petitioner on the merits. Consent was declined. Consent was granted on behalf of the petitioner and the respondent-plaintiff. These letters of consent have been filed with the Clerk.

The American Civil Liberties Union is a nation-wide non-partisan organization with approximately 160,000 members in the United States. It is engaged solely in the defense of those principles embodied in the Bill of Rights. During its fifty-year existence, the ACLU has been concerned with the special responsibility labor unions have to maintain democratic standards. In a membership organization, the freedom of election and balloting is the ultimate and most important freedom in the democratic conduct and control of the group. Hence, ACLU is especially concerned that the election provisions of the Labor-Management Reporting and Disclosure Act of 1959, Title IV, 29 U.S.C. §§482-483 are interpreted and administered in such a way as to most assure free and open union elections.

This case raises important questions concerning the ability of union members to intervene in lawsuits brought by the Secretary of Labor to enforce the provisions of Title IV. It concerns, therefore, proper judicial enforcement of the statutory guarantee of free and open union elections. It also involves compelling issues of fairness,

not unlike those of due process of law. The issues in this case go well beyond the interests of the direct parties to it. In the attached brief, therefore, *amicus curiae* presents argument to place the case in the broader context.

Respectfully submitted,

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BRIEF OF AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*

Interest of *Amicus Curiae*

The interest of *amicus curiae* is set forth in the preceding motion.

Question Presented

Whether a member of a labor organization, who satisfies all conditions for intervention of right under Rule 24(a), FRCP, is entitled to intervene, on behalf of himself and other members desiring a new election of union officers, in a civil suit brought by the Secretary of Labor under the LMRDA, to set aside a union election.

Statement of the Case

This is one in a series of lawsuits brought or brought about by the petitioner and others as a part of a coordinated effort to reform and democratize one of the nation's largest labor unions, the United Mine Workers of America (hereinafter referred to as UMW). The history of this effort and of this lawsuit, is set out in some detail in the *Petition for Writ of Certiorari,* pp. 7-19. Suffice it to say, this Court is asked to reverse the decisions of the courts below denying the petitioner, Mike Trbovich, the right to intervene in the present lawsuit. This particular suit was brought by the Secretary of Labor, under Section 402(b) of the Labor-Management Reporting and Disclosure Act of 1959 (hereinafter referred to as LMRDA), 29 U.S.C. Section 482(b), to set aside the UMW's December 9, 1969 election of International officers on grounds of massive election irregularities.

The petitioner was the campaign manager for the late Joseph A. "Jock" Yablonski, who unsuccessfully opposed the incumbent UMW president, W. A. "Tony" Boyle, in the December 9, 1969 election. Pursuant to Section 402(a) of the LMRDA, 29 U.S.C. Section 482(a), on December 18, 1969, Mr. Yablonski filed timely charges with the Secretary of Labor contesting the election on several grounds under Title IV of the LMRDA. After the murder of Mr. Yablonski, and his wife and daughter, in January 1970, the petitioner succeeded to the complaint. He filed a formal complaint on January 20, 1970. Presently, petitioner is National Chairman of the Miners for Democracy, a reform party within the UMW.

On March 5, 1970, after conducting his investigation of the December 9, 1969 election, the Secretary of Labor brought the present lawsuit, based upon petitioner's complaint, in the District Court for the District of Columbia. In his first cause of action he alleged violations of Title IV of the LMRDA. In his second cause of action, he alleged violations of record keeping and reporting requirements of Title II of the LMRDA.

On October 2, 1970, petitioner moved on behalf of himself and the Miners for Democracy, under Rule 24(a) of the Federal Rules of Civil Procedure, for leave to intervene as of right or, in the alternative, for permission to intervene under Rule 24(b).

Petitioner proposed additional allegations and claims for relief, all of which were encompassed within the complaint filed with the Secretary of Labor. The additional allegations related to political manipulation of the UMW Welfare and Retirement Fund, perpetuation of paper or "bogus" local unions, and the union's failure to provide and make available to its members adequate information about, and records of, its finances as required by Section 201 of the LMRDA, 29 U.S.C. Section 431. As additional claims for relief, the petitioner requested the District Court to require: (1) disbanding of the bogus locals; (2) installation of a Board of Monitors to oversee UMW financial affairs; (3) publication of a finding that the incumbent president breached his fiduciary duty to all members of the union by manipulating the Welfare and Retirement Fund for political advantage; (4) establishment of rules for conduct of a rerun election, or appointment of a panel, to be paid for out of UMW funds, to establish and enforce

fair rules for a rerun election; and (5) granting of proposed intervenor attorney fees and costs.

Intervention was denied by the District Court solely on the ground that by according the Secretary exclusive power to initiate suit under Title IV, Congress also precluded intervention by aggrieved union members in such suits as the Secretary decided to bring. In a *per curiam* order, the Court of Appeals for the District of Columbia affirmed the denial of intervention.

ARGUMENT

I.

The rule of *Calhoon* v. *Harvey* does not preclude intervention in the Secretary's suits to enforce Title IV.

This Court has held that suits falling "squarely within Title IV of the [LMRD] Act . . . are to be resolved by the administrative and judicial procedures set out in that Title." *Calhoon* v. *Harvey,* 379 U.S. 134, 141. With certain exceptions not relevant here, the statute

> . . . sets up an exclusive method for protecting Title IV rights, by permitting an individual member to file a complaint with the Secretary of Labor challenging the validity of any election because of violations of Title IV. Upon complaint the Secretary investigates and if he finds probable cause to believe that Title IV has been violated, he may file suit in the appropriate district court. *Calhoon* v. *Harvey, supra,* 379 U.S. at 140.

According to this Court, Congress sought to accomplish three goals through Title IV's exclusive enforcement machinery. (1) Individuals should not be permitted "to block or delay union elections by filing federal-court suits for violation of Title IV." *Calhoon* v. *Harvey, supra* at 140. (2) "Reliance on the discretion of the Secretary is in harmony with the general congressional policy to allow unions great latitude in resolving their own internal controversies . . . " *Calhoon* v. *Harvey, supra* at 140. (3) When unions fail to remedy election difficulties internally, Congress chose "to utilize the agencies of Government most familiar with union problems to aid in bringing about a settlement through discussion *before resort to the courts.*" *Calhoon* v. *Harvey, supra* at 140-41. (Emphasis added.)

In *Calhoon,* however, the Court was concerned only with the exclusivity of the Title IV machinery, and the Secretary's control over enforcement, "*before resort to the courts,*" *Calhoon* v. *Harvey, supra* at 140-41. (Emphasis added.) Once the Secretary files his suit, a binding determination has been made that the dispute is fit for judicial resolution, and the Secretary's exclusive control ends.* Different considerations govern the question of who may participate in the proceedings. As Professor Shapiro observed, just because Title IV vests in the Secretary exclusive authority to bring suit:

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* Some courts have ruled that the Secretary's control is never absolutely exclusive, and that complaining parties under Section 402 "have a judicially enforceable right to demand that the Secretary exercise his discretionary authority in a manner consistent with the requirements of the Act and not arbitrarily or capriciously." *De Vito* v. *Shultz,* 300 F. Supp. 381, 383 (D.D.C. 1969); *Schonfeld* v. *Wirtz,* 258 F. Supp. 705, 708 (S.D.N.Y. 1966). See *Citizens to Preserve Overton Park* v. *Volpe,* 91 S. Ct. 814 (1971).

> [I]t need not follow that the complainant who starts the machinery of the Secretary in motion may never intervene to protect his interest once a case is filed. That determination may well turn on a number of factors quite separate from his standing to sue, including the nature of his interest and the adequacy of the protection afforded that interest by existing parties. Shapiro, *Some Thoughts on Intervention Before Courts, Agencies, and Arbitrators,* 81 HARV. L. REV. 721, 726-27 (1967).

See *Shultz* v. *United Steelworkers of America,* 312 F. Supp. 538, 539 (W.D. Pa. 1970), where a union officer whose election was challenged by the Secretary's suit was held to have sufficient interest to justify intervention "to protect his property interests"—presumably in his job.

None of the policy considerations discussed in *Calhoon* pertains once the Secretary has filed suit: (1) If any union election is blocked or delayed, it is because the Secretary has exercised his exclusive jurisdiction to bring suit. Intervention by interested parties will not change that fact. (2) Once the Secretary has filed suit, the time for "allow-[ing] unions great latitude in resolving their own internal controversies . . . " (*Calhoon* v. *Harvey, supra* at 140) obviously has passed. (3) So has hope of "bringing about a settlement through discussion *before resort to the courts.*" *Calhoon* v. *Harvey, supra* at 140-41. (Emphasis added.) Further, the legislative history of Title IV amply supports an interpretation that allows intervention. See *Petition for Writ of Certiorari,* pp. 23-29.

II.

Title IV should be interpreted to allow intervention in appropriate cases, such as the present case.

Intervention is welcome, indeed invited, in federal civil practice. Thus it is not at all unusual for parties who are unable to bring suit to be empowered to intervene once suit is brought. For example, this Court has long held in diversity of jurisdiction cases that parties may intervene even though they would have destroyed federal court diversity jurisdiction if they had originally been parties. *Phelps* v. *Oaks*, 117 U.S. 236. See *Formulabs, Inc.* v. *Hartley Pen Co.*, 318 F.2d 485 (9th Cir. 1963), *cert. denied*, 375 U.S. 945; *Pennsylvania R.R. Co.* v. *Erie Avenue Warehouse Co.*, 302 F.2d 843, 845 (3rd Cir. 1962). According to Professor Shapiro:

> [T]o decide whether a particular action may be brought by this plaintiff against this defendant may require a determination of whether the controversy is ripe for adjudication, whether the parties before the court are the real parties in interest, and whether the interests asserted are sufficient to mobilize the judicial machinery. When one seeks to intervene in an ongoing lawsuit, these basic questions have presumably been resolved; the disposition of the request, then, should focus on whether the prospective intervener has a sufficient stake in the outcome and enough to contribute to the resolution of the controversy to justify his inclusion. Shapiro, *supra*, 81 HARV. L. REV. at 726.

Intervention in civil actions in federal district court is governed by Rule 24 of the Federal Rules of Civil Proce-

dure. It was most recently revised in 1966, seven years *after* enactment of the LMRDA. According to this Court, "some elasticity was injected" in Rule 24 by the 1966 amendment. *Cascade-National Gas Corp.* v. *El Paso Natural Gas Corp.*, 386 U.S. 129, 134. In other words, intervention is to be the rule, rather than the exception.

Rule 24(b) provides for permissive intervention by claimants in several broad categories. Most pertinent to this case, Rule 24(a) permits intervention as a matter of right:

> . . . when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

The petitioner satisfies all of the requisites of Rule 24(a). (1) As the leader of a minority party within the UMW, he claims a substantial interest in "the subject matter of the action." He is the present successor to Jock Yablonski, and "the subject matter of the action" is the legality of the December 9, 1969 UMW election in which Mr. Yablonski unsuccessfully sought the presidency of the Union. He challenges that election; that challenge is the crux of the lawsuit. (2) Unquestionably, "disposition of the action" *will* "impair or impede" the petitioner's "ability to protect that interest." Since the Secretary has "exclusive" control over the decision to bring a lawsuit to enforce Title IV, to all intents and purposes, "disposition of the action" will result in final adjudication of the petitioner's

interest. (3) The petitioner's "interest is [not] adequately represented by the existing parties." The UMW is an adverse party. And there is not merely a "difference of opinion concerning the best method of handling the litigation" between petitioner and the Secretary. *Brief of the Secretary of Labor in Opposition to the Petition for Writ of Certiorari,* p. 11. The petitioner differs fundamentally about whether certain of the Union's actions are unlawful, and as to appropriate remedy. In fact, the Secretary has declined to allege three violations of the statute, or to request several items of relief that the petitioner considers crucial to full adjudication of his interest and the cause of action.

Thus the Secretary's contention that the petitioner fails to meet the requisites for intervention as of right is unavailing. Equally unavailing is the Secretary's anxiety that if the petitioner may intervene "the trial itself would inevitably be delayed and protracted by the additional issues which petitioner seeks to interject." *Brief of the Secretary of Labor in Opposition,* p. 13. Some inconvenience always results from adding parties to litigation; that is the price of ever allowing intervention. This is a small price for the vindication of a real party's substantial interest. Further, this Court is not called upon in the present appeal to pass upon all of the issues involved in intervention.

> When one is granted intervention, either as of right or in the exercise of discretion, it does not necessarily follow that he must be granted all the rights of a party at the trial and appellate levels, including full rights of discovery and cross-examination, the ability to veto a settlement of the case, and the right to appeal from a final decision. It is both feasible and desirable

> to break down the concept of intervention into a number of litigation rights and to conclude that a given person has one or some of these rights but not all. Shapiro, *supra*, 81 HARV. L. REV. at 727 (footnotes omitted).

Resolution of these additional issues should await the making of a trial record.

In cases like the present one, denial of the right to intervene offends a healthy sense of fairness, and may raise serious constitutional questions under the due process clause of the Fifth Amendment and Article III. *Cf.* Shapiro, *supra*, 81 HARV. L. REV. at 726; Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362 (1953).

Affirmative steps taken by the petitioner were jurisdictional requisites to the Secretary's cause of action. Section 402, LMRDA, 29 U.S.C. §482. The interest being sued upon is that of the petitioner, and those he represents, not that of the Secretary. The petitioner and those he represents will feel the burden or gain the benefit of any resolution of this lawsuit, not the Secretary. The petitioner and those he represents are the experts about the UMW and its election processes (*Petition for Writ of Certiorari*, pp. 9-17, 35-37), not the Secretary. If the petitioner is foreclosed from intervening, his "private" interest is forever submerged and lost in the "public" interest. This lawsuit will conclude the election dispute and either vindicate or extinguish petitioner's interest. With the federal courts increasingly enabling private parties to act as "private attorneys general" to enforce laws securing the public interest it seems strange indeed to preclude interested private par-

ties, like the petitioner, from intervening in public lawsuits designed more to secure their interests than to secure those of the public. See, e.g., *Common Cause* v. *Democratic National Committee*, D. Ct. D.C. Civ. Action 61-71 (1971); *Office of Communication, United Church of Christ* v. *FCC*, 359 F.2d 994 (D.C. Cir. 1966); see also, *Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U.S. 150.

A compelling precedent in a closely analogous area supports the right to intervene in Title IV actions. In *International Union, UAW* v. *Scofield*, 382 U.S. 205, this Court decided that parties who are successful in unfair labor practice proceedings before the National Labor Relations Board have a right to intervene in Court of Appeals review proceedings. A basis for the Court's decision was the desire to conserve judicial energy, for under the NLRA, the charging party might bring a second appeal if the Board's decision were reversed. 382 U.S. at 212. Nevertheless, the principle of *Scofield* is applicable to Title IV actions, as is much of the Court's analysis. Just as under Title IV of the LMRDA, the scheme of the National Labor Relations Act (hereinafter NLRA) places in the Board and its General Counsel exclusive power over enforcement of the statute and prosecution of violations. Just as under Title IV, the NLRA is silent with respect to the right of a private party, who is successful in the administrative process, to intervene in judicial review proceedings. Just as under Title IV, in the NLRA, public and private interests are "interblend[ed] in the intricate statutory scheme." *International Union, UAW* v. *Scofield, supra*, 382 U.S. at 220. Yet in *Scofield*, the Court held in favor of intervention, declaring: "To employ the rhetoric of 'public inter-

est,' however, is not to imply that the public right excludes recognition of parochial private interests." 382 U.S. at 218.

Although the enforcement machinery established in Title IV is exclusive, the provisions for enforcement are to be construed generously, to assure vindication of "the interests protected by §401." (These interests are both public and private.) *Wirtz* v. *Local 153, Glass Bottle Blowers Ass'n*, 389 U.S. 463, 475. Hence this Court has held that an intervening union election does not moot a suit brought by the Secretary to challenge a prior election (*Wirtz* v. *Local 153, supra*), and the Secretary's cause of action under the statute is not limited solely to the allegations made in the union member's complaint to the union and to the Secretary, but may extend to matters of which the union had constructive notice and opportunity to cure (*Wirtz* v. *Local 125, Laborers' Int'l Union*, 389 U.S. 477). Last Term in *Hodgson* v. *Steelworkers, Local 6749*, 91 S. Ct. 1841, the Court held that the Secretary may litigate only those alleged violations which were raised by the complaining member before his union. The claims which the Secretary may raise are limited to those raised initially by the complaining member before his union, and brought to the Secretary's attention by the complaining member, and not other possible claims which the Secretary may discover in the course of his own investigation. Thus the Court has, in effect, recognized the "private" interest and not merely the general "public" interest to be enforced under Title IV.

The controlling precedents of this Court, therefore, lead to the conclusion that when a union member-complainant can expand upon the Secretary's district court complaint

(without going beyond the charges filed with the Union and the Secretary) and thereby assure complete vindication of *all* the interests protected by Title IV (see *Petition for Writ of Certiorari*, pp. 35-37), he should be allowed to intervene in the Secretary's suit in a manner consistent with Rule 24 of the Federal Rules of Civil Procedure. This analysis is fully confirmed by the legislative history of Title IV. See *Petition for Writ of Certiorari*, pp. 23-29.

CONCLUSION

For the reasons set forth in this brief, the Court should reverse the judgments of the courts below.

Respectfully submitted,

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